

FEDERAL MAGISTRATES COURT OF AUSTRALIA

SU & ANOR v MINISTER FOR IMMIGRATION [2005] FMCA 92

MIGRATION – Application to review decision of Migration Review Tribunal – application for visa on remaining relative grounds – Migration Regulation 1.15 – whether Applicant had a ‘spouse’ at the time of application – whether Tribunal failed to apply the correct legal test or asked the wrong question – whether necessary for Tribunal to address the requirements of the definition of spouse in Migration Regulation 1.15A – whether Tribunal failed to take into account relevant considerations.

Migration Act 1958 (C’th)
Migration Regulations 1994

James v Minister for Immigration & Multicultural Affairs [2002] FCAFC 91
Jankovic v Minister for Immigration & Ethnic Affairs (1995) 56 FCR 474
Sylvester v Minister for Immigration & Multicultural & Indigenous Affairs
[2002] FCA 1460
Minister for Immigration & Multicultural & Indigenous Affairs v Hughes
[1999] FCA 325
Ling v Minister for Immigration & Multicultural & Indigenous Affairs [2004]
FCA 10
Minister for Aboriginal Affairs v Peko-Wallsend Limited (1985-1986) 162 CLR
24
*Tobacco Institute of Australia Limited v National Health and Medical Research
Council* (1996) 71 FCR 265
Minister for Immigration & Ethnic Affairs v Wu Shan Liang (1996) 185 CLR
259
Minister for Immigration & Multicultural Affairs v Yusuf [2001] HCA 30

Applicant: GUI XIN SU & ANOR

Respondent: MINISTER FOR IMMIGRATION &
MULTICULTURAL & INDIGENOUS
AFFAIRS

File No: SYG1173 of 2004

Delivered on: 24 February 2005.

Delivered at: Sydney

Hearing date: 9 November 2004

Judgment of: Barnes FM

REPRESENTATION

Counsel for the Applicant: Mr C. Jackson

Solicitors for the Applicant: Birbas Attorneys

Counsel for the Respondent: Mr R. Beech-Jones

Solicitors for the Respondent: Sparke Helmore

ORDERS

(1) That the application is dismissed.

**FEDERAL MAGISTRATES
COURT OF AUSTRALIA AT
SYDNEY**

SYG1173 of 2004

GUI XIN SU & ANOR

Applicant

And

**MINISTER FOR IMMIGRATION & MULTICULTURAL &
INDIGENOUS AFFAIRS**

Respondent

REASONS FOR JUDGMENT

1. The second applicant is a citizen of the Peoples Republic of China. She was born on 5 August 1971. The first applicant is her father who is an Australian citizen. On 27 July 2000 the second applicant (referred to hereafter as the applicant) lodged an application for an Other Family (Migrant) (Class BO) visa). The only subclass in that class of visas in respect of which any claims were advanced was subclass 115 (Remaining Relative). Included in the application as a secondary applicant was the applicant's daughter who was born on 24 November 1991. The application was sponsored by the applicant's father.
2. The basis for the visa application was that the applicant was the 'remaining relative' of her father within the meaning of Regulation 1.15 of the Regulations to the *Migration Act 1958* (C'th) (the Act). The applicant's parents and siblings are all Australian citizens. It was accepted that they were all usually resident in Australia. The applicant married Mr Zi Yuan Li in 1990. He is the father of the applicant's daughter. He is a citizen of the Peoples Republic of China and has

parents and siblings who still live in the Peoples Republic of China. The applicant claimed that she divorced Zi Yuan Li effective 18 April 2000.

3. The relevant issue before both the delegate of the respondent and the Migration Review Tribunal (the Tribunal) was whether the applicant had a 'spouse' at the time of her visa application. The Tribunal found that she did. Hence the existence of his relatives in China meant that she did not satisfy the definition of 'remaining relative' in Regulation 1.15 of the Migration Regulations (see sub-regulation 1.15(1)(c)(i) and (ii). The first and second applicants seek review of this decision.
4. The background to this application is that the applicant's sisters, brother and parents all became citizens of Australia between 1995 and mid-1997. In September 1998 the applicant lodged a Skilled Australian Link (Subclass 105) visa application. Zi Yuan Li was included in that application as her spouse. Their daughter was also included. This application was withdrawn in February 2000. On 27 July 2000 the applicant applied for a Class BO visa on the basis that she was a remaining relative. In her application she stated that she was divorced and lived in Zhaoqing city, Guangdong. Filed with the application were a number of notarial certificates including two dated 19 May 2000 certifying that the applicant and Zi Yuan Li were divorced on April 18 2000 (a third such certificate was provided subsequently), a notarial certificate and translation of a statement dated 19 May 2000 signed by Zi Yuan Li stating that he was divorced, consenting to his daughter residing in Australia with the applicant and stating that he was now residing in Gaoyao City, Guangdong Province, and also a translation of a statement from the applicant as to the circumstances of her divorce in which she claimed that since 1992 her husband had gambled and paid no attention to the family, that 'finally' the relationship broke down and that she had applied for a divorce which became 'absolution' (sic) on 18 April 2000.
5. Further documents, including notary certificates and an original divorce certificate setting out the full court decision, were requested by the Department in August 2002. Copies of a number of documents are included in the bundle of relevant documents before the court which was prepared by the solicitors for the respondents. However neither

original documents or the Chinese language copies which were certified are before the court. Translations only are reproduced. A notarial certificate that the applicant had no criminal record dated 6 September 2002 gave her address as Gaoyao City, Guangdong Province, the same address provided for her in the May 2000 notarial certificates. A notarial certificate dated 6 September 2002 stated that the applicant had purchased a room in Zhaoqing City, Guangdong Province (the address provided on her application form) but no date of purchase was provided. A notarial certificate of the same date stated that the applicant's household register was at a different address: in Nanan Town, Gaoyao City, Guangdong Province. Another certified that the copies of Household Register No.011453 were in conformity with the originals held by the applicant. A 'translation' of a household register stated that the applicant was the head of household, was divorced and had moved within the city in 1991. It also gave details of her daughter who was said to have moved within the city in 1995.

6. Another notarial certificate certifies that a 'copy' is in conformity with an original of a specified certificate of the People's Court of Gaoyao City which the applicant held. A translation dated 3 October 2002 entitled 'The Civil Mediation Certificate' from the Local Court of Gaoyao City, China issued 10 April 2000 states that after mediation and deliberation of the Court, the applicant and Zi Yuan Li, (both described as residing at an address in Nanan Town, Gaoyao City) had entered an agreement as to divorce, custody of the child and entitlement to property and that the civil mediation letter would be 'with legal effectiveness' once it was signed by both parties. It is dated 18 April 2000. A family composition form was completed by the applicant on 18 October 2002 on which she gave as the address for herself and for her daughter the address on the protection visa application. A translation of an undated letter said to be on company letterhead states that Zi Yuan Li 'now' resides at an address in Zhaoqing City, Guangdong. The translation is dated 30 September 2002.
7. On 16 November 2002 a delegate of the respondent refused the grant of a Class BO visa to the applicant concluding that the applicant and Zi Yuan Li were in a marital relationship and as he had relatives in China with whom the applicant and Zi Yuan Li were in regular contact the

applicant failed to satisfy Migration Regulation 1.15(1)(c)(i), (ii) and 1.15(1)(d). The delegate's decision referred to a site visit to the applicant's place of residence which was undertaken unannounced on 10 October 2002. Included in the documents before the court are what appear to be two of the three pages of the report prepared in relation to a site visit to an address in Zhaoqing.

8. The applicant's father (the first applicant in these proceedings) sought review of the decision to refuse the visa by the Migration Review Tribunal on 2 December 2002. On 18 August 2003 the Tribunal wrote to the review applicant and to his migration agent under s359A of the Migration Act seeking comment on information about what was observed and inconsistencies and conflicting claims in what the applicant said during the site visit in October 2002. Comment was also sought in relation to a man who had arrived at the applicant's residence during the interview claiming to be a Mr Wu Sheng and a friend. The applicant had claimed his name was He Shao Rong and that he was her cousin.
9. On 19 September 2003 the Tribunal received a response, being a translation of a letter from the applicant attached to a letter from the migration agent, addressing issues arising out of the site visit and interview. Also provided was documentation said to relate to the applicant's cousin and his visits to her home.
10. On 26 March 2004 the Tribunal affirmed the delegate's decision. In the reasons for decision the Tribunal summarised the claims of the applicant and referred to relevant documents submitted in connection with the visa application. In relation to the Departmental site visit the Tribunal recorded that during the interview at the applicant's residence, the applicant initially claimed she lived alone in the house with her daughter and that contrary to the Departmental records she claimed to have separated in 1997 and divorced in 1999. A man arrived at the residence, gave his name as Wu Sheng, claimed to be a friend and departed almost immediately. The applicant claimed that the man was her cousin and had a different name (He Shao Rong), that his mother lived in the house as well and helped look after the applicant's daughter and that her cousin often ate meals with them. The Tribunal noted that on inspection of the master bedroom, in which

the applicant claimed to sleep, the Departmental officers had observed men's clothing, shoes and personal items that the applicant claimed belonged to her cousin. When further questioned the applicant claimed that she lived at the residence with her daughter and aunt and that her cousin came to visit and stayed the night up to four times a week. The applicant claimed that her cousin was married but she could not name his wife who sometimes stayed at the house. The officers had noted that there was a man's wallet in the master bedroom which contained a photograph of the man who had arrived at the residence, the applicant, her child and another child. The applicant claimed that this was her wallet. The applicant offered differing explanations of who stayed in each room and claimed that her cousin and his wife occupied the master bedroom. The report also stated that after the interview the officers spoke to a group of women outside the building. When they showed a photograph of the visa applicant and her daughter to the group, one of the women said to another 'that is your daughter-in-law'. The woman spoken to cut the conversation short, interjected and prevented the other women from speaking.

11. The Tribunal summarised the applicant's claims about her cousin and the evidence of the review applicant (the applicant's father) at the hearing. In a chronology it included the divorce on 18 April 2000 and Zi Yuan Li's declaration on 30 September 2002 that he resided in another city.
12. The Tribunal found that there were a number of inconsistencies in the evidence which did not support the claims. It referred to the fact that the father of the applicant claimed that the applicant's aunt lived with her to care for the applicant's child. The Tribunal asked (rhetorically) why the (ex) mother-in-law would also be required to care for the child. The Tribunal also had regard to the fact that during the field visit the applicant had changed her account of who stayed at the residence according to what was being found during the inspection and that she did not know the name of Mr Wu Sheng's wife.
13. The Tribunal noted that a number of Chinese Notary Certificates had been provided in support of the applications. It referred to independent information that Chinese Notary Certificates were at best secondary evidence of the events they purported to document. It stated:

“Although notaries are empowered to issue certificates only after they conclude that the applicant’s claims are true, the certificates can be based on primary evidence, secondary evidence, testimony of the applicant or other parties, or investigation by the notary”.

14. In light of this information, the field visit and the inconsistencies in answers about the date of separation and divorce, the Tribunal gave the notarial certificates little weight. The Tribunal was ‘satisfied that the applicant continues to be in a spousal relationship with her ex-husband’, Zi Yuan Li, and that she ‘has tried to hide that fact’. As the Tribunal found that the applicant was still in a spousal relationship with her ex-husband, his relatives were also considered to be overseas near relatives residing in the same country as the applicant. There were more than three such relatives and hence the applicant did not come within the definition of remaining relative. Relevantly the Tribunal expressly found “The Tribunal does not accept that the spousal relationship of the primary visa applicant had ceased at the time of application. Mr Zi Yuan Li was still the ‘spouse’ of the primary visa applicant at the time of application. He has four overseas near relatives residing in China”.
15. On 21 April 2004 the applicant filed an application seeking review of the Tribunal decision. An amended application was filed in court at the commencement of the hearing which relies on the following grounds:

Ground 1

1. *The Tribunal addressed the wrong question when it found that it “did not accept that the spousal relationship of the primary visa applicant had ceased at the time of application”, and in addressing the wrong question, the Tribunal exceeded its jurisdiction, or was in want of its jurisdiction.*

Particulars

1. *Given the implicit finding by the Tribunal that the second applicant and her husband had divorced, the Tribunal should have considered whether or not the second applicant and her husband met the criteria prescribed under the Migration Regulations, Rule 1.15A, and the Tribunal failed to consider that question.*

Ground 2

2. The Tribunal failed to exercise its jurisdiction in failing to take into account relevant considerations, namely the existence of credible, significant and up-to-date documentary evidence in support of the first applicant's claim.

Particulars

1. The company document on company letterhead indicating that the applicant's ex-husband lived in Zhaoqing City (RD104).

2. The court divorce records, dated 10 April 2000 (RD105).

3. The household registration papers, indicating that the second applicant lived with her daughter only in Gaoyao City (RD107).

Ground 1: failing to apply the correct legal test or asking the wrong question.

16. The applicant sought a Class BO visa on the basis that she was a remaining relative of her father within the Migration Regulation 1.15 definition of 'remaining relative' and subclass 115. Regulation 1.15 relevantly provides:

(1) An applicant for a visa is a remaining relative of another person who is an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen if the applicant satisfies the Minister that:

(a) the other person is a parent, brother, sister, step-parent, step-brother or step-sister of the applicant; and

(b) the other person is usually resident in Australia ; and

(c) if the applicant or the applicant's spouse (if any) has an overseas near relative:

(i) the applicant and the applicant's spouse (if any) usually reside in a country, not being Australia, that is different to the country in which that relative resides; and

(ii) neither the applicant nor the applicant's spouse (if any) have had contact with that relative within a reasonable period before making the application; and

(d) the applicant and the applicant's spouse (if any) together have not more than 3 overseas near relatives;

17. It was contended by the applicant that in considering whether the applicant met the requirements of Regulation 1.15, the Tribunal should have considered whether she and her husband met the criteria prescribed under Regulation 1.15A which defines 'spouse' for the purposes of the Migration Regulations.
18. Regulation 1.03 of the Migration Regulations contains a number of definitions which apply in the Regulations unless the contrary intention appears. Spouse is defined as having the meaning set out in Regulation 1.15A. Regulation 1.15A relevantly provides:

Spouse

(1) *For the purposes of these Regulations, a person is the spouse of another person if the 2 persons are:*

- (a) in a married relationship, as described in subregulation (1A); or*
- (b) in a de facto relationship, as described in subregulation (2).*

(1A)

Persons are in a married relationship if:

- (a) they are married to each other under a marriage that is recognised as valid for the purposes of the Act; and*
- (b) the Minister is satisfied that:*
 - (i) they have a mutual commitment to a shared life as husband and wife to the exclusion of all others; and*
 - (ii) the relationship between them is genuine and continuing; and*
 - (iii) they:*
 - (A) live together; or*
 - (B) do not live separately and apart on a permanent basis.*

(2) Persons are in a de facto relationship if:

- (a) they:*

- (i) *are of opposite sexes; and*
- (ii) *are not married to each other under a marriage that is recognised as valid for the purposes of the Act; and*
- (iii) *are not within a relationship that is a prohibited relationship for the purposes of subsection 23B(2) of the Marriage Act 1961; and*
- (b) *they are of full age, that is:*
 - (i) *if either of the persons is domiciled in Australia— both of them have turned 18; or*
 - (ii) *if neither of the persons is domiciled in Australia — both of them have turned 16; and*
- (c) *the Minister is satisfied that:*
 - (i) *they have a mutual commitment to a shared life as husband and wife to the exclusion of all others; and*
 - (ii) *the relationship between them is genuine and continuing; and*
 - (iii) *they:*
 - (A) *live together; or*
 - (B) *do not live separately and apart on a permanent basis; and*
- (d) *subject to paragraph (e) and subregulation (2A), where either of them is an applicant for a permanent visa, a Student (Temporary) (Class TU) visa, a Partner (Provisional) (Class UF) visa, or a Partner (Temporary) (Class UK) visa — the Minister is satisfied that, for the period of 12 months immediately preceding the date of application of the party relying on the existence of the relationship:*
 - (i) *they had a mutual commitment to a shared life as husband and wife to the exclusion of all others; and*
 - (ii) *the relationship between them was genuine and continuing; and*
 - (iii) *they had:*

- (A) *been living together; or*
- (B) *not been living separately and apart on a permanent basis; and*

.....

(2A) *Paragraph 2 (d) does not apply if:*

(a) *the applicant is applying as:*

(i) *the spouse of a person who:*

(A) *is, or was, the holder of a permanent humanitarian visa; and*

(B) *before that permanent humanitarian visa was granted, was in a relationship with the applicant that satisfies the requirements of subparagraphs (2) (c) (i), (ii) and (iii) and of which Immigration was informed before the visa was granted; or*

(ii) *a member of the family unit of a person who is an applicant for a permanent humanitarian visa; or*

(b) *the applicant can establish compelling and compassionate circumstances for the grant of the visa.*

.....

19. Counsel for the applicant submitted that the Tribunal had implicitly accepted that the applicant had divorced her husband, because it referred to him as her ‘ex-husband’ (in finding that the applicant was still in a spousal relationship with him). It was contended that even though the Notary Certificates were given little weight, the implication of a finding that the applicant was divorced was unavoidable without the rejection of other documents provided such as the marriage certificate, a translated summary of the divorce case and the ‘household registration’ document which stated that the applicant was divorced, did not list any other adult as living at the house in question and listed her (and not her ex-husband) as the ‘head of the household’.
20. Hence it was contended that the test of whether the applicant had a ‘spouse’ fell to be determined with reference to the de facto relationship limb of the definition of ‘spouse’ in Regulation 1.15A(2)

as the applicant and her husband were divorced. Nowhere was any test referred to by the Tribunal. It was submitted that the Tribunal erred in that it had not considered whether there was a mutual and exclusive commitment nor whether the relationship was genuine and continuing or made any finding as to whether or not the applicant's husband was, in fact, living with her. It was also contended that the Tribunal had not made a necessary finding as to whether the requisite elements of de facto relationship had been met for the period of 12 months immediately preceding the application made on 27 July 2000 as required by Regulation 1.15A(2)(d). (It was not suggested that the Tribunal was obliged to address the factors in Regulation 1.15A(3) as the visa sought by the applicant was not one of the classes of visas in relation to which the Tribunal is under an obligation to consider the specified factors).

21. The respondent contended first that the Tribunal did not accept that the applicant and Zi Yuan Li were divorced, because it did not accept the documentary material or the testimony that there had been a divorce. In the alternative, even if the Tribunal did accept that there was a divorce, it was said not to be in dispute that there had been a spousal relationship in the past. Hence the only question for the Tribunal was whether that relationship had ceased. It was submitted that the finding that the Tribunal did not accept that the spousal relationship had ceased at the time of the visa application (27 July 2000) had to be placed in the context of the material that was before the Tribunal.
22. Considering first whether the Tribunal accepted that the applicant was divorced, it was common ground that the applicant married Zi Yuan Li in 1990 and that he was the father of her child. The respondent submitted that the only evidence of the fact of divorce was the applicant's assertions and what was described as a notarial certificate of divorce. In fact the applicant's father also asserted that she was divorced. There are a number of notarial certificates certifying that the applicant was divorced on 18 April 2000. Also included in the bundle of relevant documents is the translation of a document said to be signed by a notary dated 6 September 2002 and certifying that "the above copy is in conformity with the original of Certificate of the People's Court of Gaoyao City with (2000) YMC Zi No.97 which the applicant holds and that the seal on the original is authentic". Because of the

manner in which the bundle of relevant documents is assembled (translations only reproduced), the Chinese language ‘copy’ of the certificate of the People’s Court is not before this Court. This particular notarial ‘certificate’ is not attesting to the fact that any event has occurred (in contrast to the notarial certificates of divorce and criminal record) but is verifying that a copy is an accurate copy of an original bearing an authentic seal. There is also a document described as a translation of a Civil Mediation Certificate issued by the Local Court of Gaoyao City on 10 April 2000 which bears the same serial number as that referred to in the ‘notarial certificate’. It also bears a handwritten number 126 which accords with the Tribunal description of a document before it as ‘at F126’ which is described as a translated copy of an application for divorce. However described, this document is date stamped ‘received’ by the Department of Immigration on 8 October 2002. It formed part of the Departmental file before the Tribunal and is evidence in support of the applicant’s claim to be divorced. As discussed below it is apparent that this is the document described by the Tribunal as the ‘application for divorce’.

23. The Tribunal did not make any express finding as to whether or not the applicant and Zi Yuan Li were in fact divorced. However the decision includes a chronology which refers to a ‘divorce’ on 18 April 2000. It noted the applicant’s claims during the field visit to have separated in 1997 and divorced in 1999 (this being in contrast to the claims made in the visa application and in the other documentation referred to elsewhere in the Tribunal reasons for decision). It gave ‘little weight’ to the notarial certificates – which attest to the fact of divorce as well as verifying the accuracy of the copy and authenticity of the seal on the original of the court document and the accuracy of copies of documents such as the Household Register. Yet it referred to Zi Yuan Li as the applicant’s ‘ex-husband’.
24. As Heerey J stated in *James v MIMA* [2002] FCAFC 91 at [14]: “It is desirable that Tribunals make clear findings of fact so that applicants can know what parts of their case have or have not been accepted and the court, which itself cannot find facts, can on judicial review ascertain whether the law has been correctly applied”. There is some lack of clarity in the Tribunal reasons in this respect. However, reading the Tribunal decision fairly and as a whole, contrary to the contentions

of the respondent I am not satisfied that the Tribunal found, either expressly or impliedly, that the applicant was not divorced or that it did not accept that the applicant was divorced. While it gave the notarial certificates ‘little weight’, implicit in the finding that the applicant ‘continues to be in a spousal relationship with her *ex-husband*’ is an acceptance by the Tribunal that Zi Yuan Li was the applicant’s ‘ex-husband’, in other words that the applicant and Zi Yuan Li were divorced at the time of the application. This is consistent with the Tribunal recognition that the mere fact of a divorce did not mean that the applicant no longer had a ‘spouse’ for the purposes of the Regulation 1.15 definition of ‘remaining relative’. It is apparent that the Tribunal drew a distinction between the concepts of ‘husband’ and ‘spouse’ and appreciated that an ‘ex husband’ (that is someone who is divorced) could still be a ‘spouse’ for the purposes of the Migration Regulations. This is relevant when one turns to the question of whether the Tribunal addressed the wrong question or failed to apply the correct legal test.

25. The issue that arises is whether the Tribunal erred in failing to address the question of whether or not the relationship of the applicant and Zi Yuan Li at the time of the visa application met the criteria prescribed in the Regulation 1.15A definition of ‘spouse’ (Regulation 1.15A). It is relevant to note that even if the Tribunal had not accepted that the applicant and Zi Yuan Li were divorced an issue would still arise as to whether it was necessary for the Tribunal to address the elements of the definition of ‘married relationship’ in Regulation 1.15A(1A).
26. In *Jankovic v MIEA* (1995) 56 FCR 474 the Full Court of the Federal Court held, in relation to a differently worded definition of ‘remaining relative’, that whether a child was a ‘non-dependent child’ for the purposes of the then definition of remaining relative was determined by ascertaining whether he or she fell within the Regulation 1.03 definition of ‘dependent child’. If not then the child was a ‘non-dependent child’. (Also see *Sylvester v MIMIA* [2002] FCA 1460 at [7] and [19]). The reasoning in *Jankovic* suggests that a similar approach would apply to determining the meaning of spouse in Regulation 1.15 as there is a definition of ‘spouse’ in Regulation 1.15A which applies for the purposes of the Migration Regulations unless the contrary intention appears. Some support for this view is also to be found in the

judgment of Heerey J in the Full Court of the Federal Court decision in *James v MIMA* [2002] FCAFC 91. In that case the court had to determine the proper construction of the expression ‘formally separated from his or her spouse’ in the Migration Regulation definition of ‘aged dependant relative’. The concept ‘formally separated’ is not defined in the Migration Act or Regulations Heerey J stated at [23] that:

“‘Spouse’ includes de facto as well as married spouse” reg 1.15A. Determination of the existence or otherwise of a de facto relationship involves factual questions such as whether there is a ‘mutual commitment to a shared life as husband and wife to the exclusion of all others’ and whether the relationship is ‘genuine and continuing’. Reg 1.15A(2)(c)(ii) and (ii).”

27. However, in the same case Cooper and Finkelstein JJ did not refer to Reg 1.15A but confined their consideration of whether there was a ‘formal separation’ to the context of a subsisting marriage as the applicant was married and the relevant part of the definition of aged dependent relative focused on a status where none of the ordinary incidents of a marriage existed such that there was no obligation on the applicant to cohabit with his or her spouse.
28. The language of paragraphs (c) and (d) of Subregulation 1.15(1) is not such as to suggest that the concept of ‘spouse’ in the definition of remaining relative is necessarily limited to a person married to the applicant. It is, however, also relevant to have regard to the manner in which Regulation 1.15 is now drafted and the particular circumstances of this case in determining whether the Tribunal fell into jurisdictional error in failing to refer expressly to the criteria in Regulation 1.15A.
29. Prior to 1999 the definition of remaining relative in subregulation 1.15 (1) stated that an applicant ‘is a remaining relative’ if a certain criteria were met and in subregulation (2) that ‘an applicant is disqualified’ if one of list of disqualifying factors was applicable. It was in the context of that provision that the Full Court of the Federal Court in *MIMIA v Hughes* [1999] FCA 325 stressed that it was for the Tribunal to be satisfied and reiterated the general principle that concepts such as onus and burden of proof had no role to play. However the definition was subsequently amended. Unlike earlier versions of Regulation 1.15, the form of Regulation 1.15 applicable in this instance requires the applicant to satisfy the Minister (and hence the Tribunal) of a number

of matters (including that the applicant and the applicant's spouse (if any) together have not more than three overseas near relatives). Hence in this case as in *Ling v MIMIA* [2004] FCA 10 at [3] per Branson J, the critical issue for the Tribunal was 'whether the visa applicant had satisfied the Tribunal' that she was no longer in a spousal relationship with her former husband. (Also see the Explanatory Statement to Migration Amendment Regulations 1999 (No.3) 1999, Statutory Rules 1999 No.259 which states that the new regulation 'ensures that the evidentiary burden in respect of an assessment of whether a person is a "remaining relative" is borne by the applicant').

30. It was not disputed that Zi Yuan Li had been the visa applicant's spouse in the past. Under Regulation 1.15 it was for the visa applicant to satisfy the Tribunal that Zi Yuan Li was no longer her 'spouse' at the time of application. Hence while the Regulation 1.15A definition of 'spouse' requires that the Tribunal be satisfied of the existence of a relationship which is either a married or a de facto relationship, under Regulation 1.15 it is for the applicant to make her case, by providing evidence in support any claim that she no longer has a spouse, for example because she is divorced and also has no mutual commitment, no genuine and continuing relationship and that she and her ex-husband did not live together at the time of the application and decision. The application of the regulation 1.15A definition in regulation 1.15 must be considered in light of the evidentiary burden placed on the applicant under regulation 1.15. I note however that it was not contended that the regulation 1.15A definition could not apply at all to the present form of regulation 1.15.

31. The Tribunal did not refer to the definition of spouse in Regulation 1.15A in its reasons for decision. However a failure to refer to the particular regulation need not be fatal if the Tribunal has not addressed the wrong question.

32. The relevant Tribunal finding was :

"The Tribunal does not accept that the spousal relationship of the primary visa applicant had ceased at the time of the application. Mr Zi Yuan Li was still the 'spouse' of the primary visa applicant at the time of application."

33. This finding must be placed in the context of the material before the Tribunal and the question it had to determine. Importantly, the Tribunal was considering not whether a spousal relationship had come into existence, but whether the applicant had satisfied it that a pre-existing relationship had ceased. It had to consider whether she had done so on the evidence before it, in this instance not only evidence about the divorce and the other documentary evidence as well as the applicant's claims, but also the independent evidence, the evidence of the 1998 visa application in which Zi Yuan Li was included as the spouse of the applicant, the evidence of the field visit, Zi Yuan Li's 2002 declaration as to his residence, the evidence at the hearing and the response to the s359A letter which had sought comment on information said to be relevant 'because it may indicate that the divorce between the primary visa applicant and her spouse is not genuine and that she is still in a marital relationship' (and which, incidentally, clearly put the applicant on notice of the critical issue).
34. It was common ground that the visa applicant was married in 1990 to Zi Yuan Li and that he was the father of her child. There was evidence of a Civil Mediation Certificate (albeit that the evidence of the genuineness of this document was the notarial certification of the copy as a copy of the original) and notarial certificates of divorce (but no copy of an original divorce certificate). The Tribunal considered the 'number of Chinese Notary Certificates' submitted but gave them little weight in light of independent evidence, the field visit and inconsistencies in answers about the date of separation and divorce. So expressed this finding also gave little weight to the notarial certificate certifying the household register. The notary certificates formed a significant part of the evidence provided by the applicant in an attempt to satisfy the Tribunal that she was no longer in a spousal relationship. In contrast to this evidence to which the Tribunal gave 'little weight', the evidence of the field visit and interview was capable of supporting a finding that Zi Yuan Li was still living with the primary visa applicant and that they were looking after their daughter. It was in that context that the Tribunal did not accept that it had been satisfied that the 'spousal' nature of their relationship had changed, albeit that Zi Yuan Li was now the applicant's 'ex-husband', that is, they were divorced. It was not in issue before the Tribunal that they had been spouses (nor that all the elements of the definition of 'spouse' in

Regulation 1.15A(1A) had been satisfied in the past). The only question was whether the relationship had changed such that they were no longer spouses. In other words it was not disputed that in the past there had been mutual commitment, a genuine and continuing relationship and that the couple lived together or did not live separately and apart on a permanent basis.

35. It is implicit in the findings that the applicant was still the spouse of her ex-husband and that the Tribunal did not accept that the spousal relationship had ceased at the time of application that the applicant had not satisfied the Tribunal that, apart from the divorce, the other requisite elements of a spousal relationship no longer existed. All that the applicant had established to the satisfaction of the Tribunal was that a divorce had occurred – but not that the relationship had otherwise changed. The mere fact of a divorce did not of itself mean that the applicant no longer had a ‘spouse’ (see Regulation 1.15A(2) and note that the criteria in Regulation 1.15(2)(c) mirror those in Regulation 1.15A(1A)(b)). This is consistent with the Tribunal finding that the applicant had tried to hide the fact that she ‘continues’ to be in a spousal relationship with her ex-husband. The Tribunal properly considered whether the applicant had satisfied it that she was no longer in a spousal relationship with her former husband.
36. In the circumstances of this case the Tribunal was not under an obligation to address expressly the language of Regulation 1.15A and whether or not the visa applicant and Zi Yuan Li met the criteria prescribed under Regulation 1.15A as contended. It did not address the wrong question. It properly recognised that the critical issue was whether the applicant had satisfied it that her spousal relationship (which had met the regulation 1.15A criteria in the past see regulation 1.15A(1A)) had ‘ceased’ at the time of the application.
37. It is worth noting that even if, contrary to my view of the Tribunal findings, the Tribunal had not accepted that the applicant was divorced, it may have been open to the applicant to satisfy it that she was no longer a ‘spouse’ if she could show that the elements of mutuality, genuineness and living together (see Regulation 1.15A(1A)(b)) were not present at the time of visa application.

38. There is one further aspect of the applicant's contention about Regulation 1.15A that requires consideration. One of the elements of a de facto relationship is in paragraph 1.15A(2)(d) which is expressed in terms of a positive requirement that the Minister (or Tribunal) be satisfied that for the 12 months 'immediately preceding the date of application of the party relying on the existence of the relationship' the elements of a de facto relationship were present. Transposed to the criteria in Regulation 1.15 this does not sit easily – while the visa application in question was an application for a permanent visa, the visa applicant who claims to be a remaining relative is in no way 'relying on' the existence of a de facto relationship. On the contrary. Such a relationship would defeat her application. Neither party addressed how such a provision could operate in the context of the present version of regulation 1.15 which puts the obligation on the applicant to satisfy the Tribunal. It is not necessary to resolve the issue in this instance. The Tribunal was satisfied that the applicant continued to be in a spousal relationship with her ex husband. That finding implicitly rejects any contention that the relationship had not 'continued' during the 12 months preceding the date of visa application. Hence, insofar as paragraph 1.15A(2)(d) is applicable, its requirements were addressed by the Tribunal findings. The Tribunal was considering a situation where there was no doubt that in the past the applicant and Zi Yuan Li had a mutual commitment, a genuine and continuing relationship and lived together. It was not satisfied with the material put forward by the applicant to show that such relationship had ceased. As the relationship was found to be on-going, it followed that it would have been so for the 12 months preceding the application.

Ground 2: failure to take into account relevant considerations

39. The applicant contended that even if the court were to accept, as the respondent suggested, that the Tribunal had found implicitly that the applicant and her husband were not divorced and that they lived together (or not apart permanently) then the Tribunal could not have done so without dealing with the material which had been provided which was relevant to that determination and which could have led to a different result. It was said that this constituted a failure to take into account significant, credible and up-to-date information bearing upon a matter which a decision-maker was bound to take into account

(Minister for Aboriginal Affairs v Peko-Wallsend Limited (1985-1986) 162 CLR 24 at 44) and was an error going to jurisdiction.

40. It was submitted that the Tribunal had not considered three documents referred to in the amended application; (1) the court divorce records dated 10 April 2000; (2) the household registration papers indicating that the applicant lived with her daughter in Gaoyao City and (3) the document on letterhead about Zi Yuan Li's address. Each of those documents was said to be critical in assessing matters the Tribunal was bound to take into account in determining whether or not the applicant was in a spousal relationship with her ex-husband. It was accepted that the Tribunal was entitled to reject either the authenticity of the documents or the accuracy of their contents, but submitted that it was not entitled to reject them without considering them and without providing reasons for their rejection. On this basis it was said that the Tribunal failed to take into account relevant material central to the applicant's claims and did not address the correct question of law in determining that the applicant did not meet the criteria for the grant of the relevant visa.
41. It was contended that each of the documents contained in the bundle of relevant documents described as 'translation of document as attached' was provided in response to the Department's request. The Department had requested an original and certified photocopy of the resident's registration book from the local district (plus English translation), and the original divorce certificate setting out the full court decision and contact details for the applicant's ex-husband Zi Yuan Li. Counsel for the respondent took issue with the nature of the evidence before the Tribunal. He contended that it seemed clear that the original household registration document (as distinct from a copy) had not been provided to the Department or Tribunal. A notarial certificate certifies that copies were in conformity with the originals of a numbered household register which the applicant held. Such certification is in accordance with the request from the Department for the provision of a certified photocopy of a resident's registration book from the local district plus English translation. The original was also requested. The court does not have before it the whole of the Department file which the Tribunal had before it. The relevant letter from the applicant's adviser merely

refers to 'requested documentation'. It has not been established that the original registration book was provided to the Department.

42. Similarly, the Department had requested an original divorce certificate. There is no document entitled certificate of divorce in the material before the Court or any 'copy' or translation of a 'certificate of divorce'. The Tribunal reasons for decision refer to a notarial certificate of divorce and a translated copy of an 'application for divorce' with a folio reference which co-incides with the folio reference marked on the translated civil mediation certification. However, the civil mediation certificate is not on its face a divorce certificate. There is also a certificate from a notary which certifies that a copy is in conformity with an original certificate of the people's court. This notarial certificate refers to a serial number which accords with the serial number contained on the civil mediation certificate. Apart from this there are three separate notarial certificates of divorce in the bundle of relevant documents which do not purport to be actual certificates of divorce or translations but rather notarial certifications of the divorce. It is the documents described as translated 'household register', translated 'civil mediation certificate' and translation of the letter about Zi Yuan Li's residence which are in issue.
43. As Counsel for the applicant conceded, the Tribunal listed a translated copy of an application for divorce as one of the documents submitted by the applicant. It is accepted that this is a reference to the civil mediation certificate. Counsel for the applicant also accepted that the translated statement about Zi Yuan Li's current place of residence was listed in the background part of the Tribunal reason for decision and that the fact of his declaration as to residence was included in the chronology. However it was contended that the limited references to some of this material did not establish that the Tribunal had taken the material into account.
44. The 'household registration' document was not referred to expressly in the Tribunal reasons for decision – although the reasons record a claim that the applicant lived in Gaoyao City and was divorced as well as the later claims about who she lived with which were made during the Departmental visit to her residence in Zhaoqing City.

45. The primary relevance of the household registration document was said to be that it indicated that the applicant was the head of the household, that the only other person listed as living with her was her daughter, and that she was divorced. It was contended that this, in conjunction with the document stating that her ex-husband lived in Zhaoqing City, indicated that the applicant was living in a different city (the household register refers to Gaoyao City) and that the Tribunal erred in not considering these documents.
46. It was suggested that a consideration of the relevant elements of a ‘spouse’ relationship must, on the authority of *Peko-Wallsend* per Mason J at 44, be based on the ‘most recent and accurate information’ that the Tribunal. As Mason J stated at 45:
- “It would be a strange result indeed to hold that the Minister is entitled to ignore material of which he has actual or constructive knowledge and which may have a direct bearing on the justice of making the land grant, and to proceed instead on the basis of material that may be incomplete, inaccurate or misleading. In one sense this conclusion may be seen as an application of the general principle that an administrative decision-maker is required to make his decision on the basis of material available to him at the time the decision is made. That that principle is itself a reflection of the fact that there may be found in the subject matter, scope and purpose of nearly every statute conferring power to make an administrative decision and implication that the decision is to be made on the basis of the most current material available to the decision-maker”*
47. It was also contended that this was cogent material that could contradict or qualify other material which went to a critical issue in the case such that it could be said that ignoring the material had led to a failure to take into account a relevant consideration (also see *Tobacco Institute of Australia Limited v National Health and Medical Research Council* (1996) 71 FCR 265 at 279). It was suggested that it could be inferred that the Tribunal had not dealt with these three documents and that they were simply overlooked in the findings and reasons stage of the Tribunal’s decision making process.
48. However, reading the Tribunal fairly and as a whole (*MIEA v Wu Shan Liang* (1996) 185 CLR 259) I am not satisfied that the Tribunal failed to take into account relevant considerations – or that it otherwise fell

into jurisdictional error in failing to take into account the three documents in issue.

49. As Mason J stated in *Peko-Wallsend Ltd* (at 39), the ground of failing to take into account a relevant consideration “can only be made out if a decision-maker fails to take into account a consideration which he is *bound* to take into account making that decision” and what factors a decision-maker is bound to consider “is determined by construction of the statute conferring the discretion”. In *MIMA v Yusuf* [2001] HCA 30 at [73] McHugh, Gummow and Hayne JJ suggested that an asserted duty to make findings is perhaps another way of expressing the duty to take account of all relevant considerations and continued (albeit in relation to the Refugee Review Tribunal):

“The considerations that are, or are not, relevant to the Tribunal’s task are to be identified primarily, perhaps even entirely, by reference to the [Migration] Act rather than the particular facts of the case that the Tribunal is called on to consider.”

50. Such reasoning is equally applicable to the Migration Review Tribunal. As their Honours stated (at [74]):

“What is important, however, is that the grounds of judicial review that fasten upon the use made of relevant and irrelevant considerations are concerned essentially with whether the decision-maker has properly applied the law. They are not grounds that are centrally concerned with the process of making the particular findings of fact upon which the decision-maker acts.” (and see [75])

51. In this instance the Tribunal was required to determine whether the applicant had satisfied it that she was no longer in a spousal relationship with Zi Yuan Li. The applicant submitted documentation in support of such a claim. The Tribunal did in fact refer expressly to two of the documents in issue. While this of itself does not mean that it took into account the claims represented by those documents, neither does the fact that the Tribunal did not expressly refer to a particular item of evidence before it in its decision, or in the findings and reasons part of the decision, of itself establish that the Tribunal failed to take into account relevant considerations in the sense of the integers or elements of the applicant’s claims.

52. It was not necessary for the Tribunal to make findings in relation to each particular item of evidence at the level suggested by the applicant. What is critical is whether the Tribunal recognised and addressed the underlying claims represented by the particular documents referred to in the applicant's amended application. In this instance I am satisfied that it did so. No failure to take into account the integers of the applicant's claims has been established. The Tribunal understood that the applicant's claim was that she was divorced, that she and Zi Yuan Li did not live together, that she lived in Gaoyao City and that Zi Yuan Li lived in Zhaoqing City (although it in fact the various documents she submitted made differing claims about her place of residence, the household register document in issue described her address as Gaoyao City while the statement about Zi Yuan Li's residence described him as living in Zhaoqing City). As to the claim that the household registration papers indicated that the only person the applicant lived with was her daughter, the Tribunal considered the evidence from the field visit and the varying accounts given by the applicant about who stayed at her residence. While the Tribunal's conclusion in relation to the continuance of a spousal relationship between the applicant and her ex-husband is not expressed in detail, the statement of the Tribunal that it was satisfied "the primary visa applicant continues to be in a spousal relationship with her ex-husband, Mr Zi Yuan Li, and has tried to hide that fact" implicitly rejects any claim that she lived only with her daughter in Gaoyao City. The Tribunal noted that the field visit was to the applicant's place of residence in Zhaoqing City. It was in this field visit that the applicant was interviewed and that the evidence that a male lived in the house with the applicant was observed. The Tribunal proceeded on the basis that Zi Yuan Li was the applicant's ex-husband. This is consistent with the Civil Mediation Certificate. It referred expressly to the divorce documentation. The description of the civil mediation certificate as an application for divorce is at most a factual error. Moreover, the only verification as to authenticity of the divorce and household registration documents provided in support of the applicant's claims was the notarial certificates. The Tribunal addressed the weight to be given to the notarial certificates, but for reasons which were open to it, gave little weight to the certificates (and hence to the documents which were so verified) in determining whether the

applicant had satisfied it that she was no longer in a spousal relationship.

53. It is clear from reading the decision as a whole that the Tribunal understood and considered the claim that the applicant had divorced Zi Yuan Li and lived separately and apart from him. It recorded her claims of marriage difficulties preceding divorce. The Tribunal also understood that the applicant claimed that she lived in Gaoyao City (as the household registration document recorded) while Zi Yuan Li declared that he lived in Zhaoqing City. However it recorded a departmental home visit to the visa applicant's place of residence in Zhaoqing City in October 2002. It did not refer expressly to the undated Household Registration document ('summarised' on 3 October 2002) with a Gaoyao City address, or, indeed to the Family Composition Form signed on 18 October 2002 giving a Zhaoqing City address. It did not have to do so, in light of its findings about the notary certificates and the evidence of the Departmental visit to Zhaoqing City and the officer's observations there. While brief, the Tribunal reasons demonstrate that it took into account, but did not accept, the applicant's claims.
54. It has not been established that the Tribunal failed to take into account relevant considerations in a manner constituting jurisdictional error. As no jurisdictional error has been established the application must be dismissed.

I certify that the preceding fifty-four (54) paragraphs are a true copy of the reasons for judgment of Barnes FM

Associate:

Date: 24 February 2005.